(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 2 3 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is an ornamental plant nursery. It seeks to employ the beneficiary permanently in the United States as a horticulturist/soil and plant scientist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On motion, the petitioner submitted copies of the beneficiary's Forms W-2 for the 2009, 2010, and 2011 tax years; copies of the beneficiary's pay stubs for the period of January 1, 2012 to May 31, 2012; copies of the petitioner's Certificate of Deposit with from February 1, 1999 to August 6, 2005; copies of the petitioner's Certificate of Deposit with from June 3, 2006 to the present; copies of the petitioner's tax returns for the 2009, 2010, and 2011 tax years; profit and loss statements for 2011 through May 2012; and copies of property deeds for the petitioner's real estate holdings and real estate valuations. This constitutes new facts and evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motion is granted.

As set forth in the director's decision dated November 2, 2009 and the AAO's decision dated May 11, 2012, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The priority date in this matter is May 1, 2001. Counsel asserts that the petitioner has established its ability to pay the proffered wage.

Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage since 2001.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the

> ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on May 1, 2001. The proffered wage as stated on the Form ETA 750 is $44,430.00 per year. The ETA Form 9089 states that the position requires a master's of science degree in horticulture and three years of work experience in the job offered or three years of work experience in a related occupation, general planting research and/or cultivation.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established on March 23, 1994 and to currently employ one worker. On the Form ETA 750, signed by the beneficiary, the beneficiary claims to have been employed by the petitioner since September 1997.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On motion, counsel asserts that the decision of the AAO was in error and that the petitioner has demonstrated its ability to pay the proffered wage in the relevant years.

The proffered wage in this matter is $44,430.00. The petitioner must establish that it could pay this wage from the priority date in 2001. 8 C.F.R. § 204.5(g)(2). USCIS may not ignore a term

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

of a labor certification. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 406 (Comm. 1986). The AAO must take into consideration the petitioner's adjusted gross income (AGI), salary or wages paid to the beneficiary, household expenses (HH expenses), and any surplus amounts (surplus $) in determining the petitioner's ability to pay the proffered wage in each year. The AAO also examines the petitioner's tax returns to determine the amount of salary or wages recorded as having been paid in each given tax year.

It appears from the record that the petitioner recorded wages paid for the 2001 through 2005 tax years at Schedule C, Part II, Expenses, "wages" at Item 26, and wages paid for the 2006 through 2011 tax years at Schedule F, Part II, Farm Expenses, "labor hired" at Item 24.

The sole proprietor listed his annual household expenses for July to December 2008 and January through June 2009, which when averaged is $928.00 per month ($11,136.00 per year) however, he failed to provide such information for the other relevant years. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a list of his personal expenses for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. In addition, there is no evidence in the record demonstrating the sole proprietor's personal expenses for 2008 through 2012. This evidence would have demonstrated the amount of the tax payer's household/personal expenses per year and would further reveal the petitioner's ability to pay the proffered wage. Without such evidence the AAO will apply the average monthly expense of $928.00 to all years. The evidence in the record demonstrates the following:

Year	Form W-2[2]	Deficiencies[3]	AGI	HH Expenses	Surplus $
2001	$29,000.00	$15,430.00	-$18,678.00	$11,136.00	$0.00
2002	$29,000.00	$15,430.00	-$39,531.00	$11,136.00	$0.00
2003	$29,000.00	$15,430.00	-$30,392.00	$11,136.00	$0.00
2004	$29,000.00	$15,430.00	-$61,638.00	$11,136.00	$0.00
2005	$29,000.00	$15,430.00	-$67,056.00	$11,136.00	$0.00

[2]It is noted that the amounts paid to the beneficiary in every year from 2001 through 2007 as reported on the Form W-2 exceed the amount listed on the petitioner's IRS Forms 1040 tax returns for those years. The combined total for wages/labor in 2001 was $24,897.00; in 2002 $24,804.00; in 2003 $24,888.00; in 2004 $24,900.00; in 2005 $24,900.00; in 2006 $24,901.00; and in 2007 $24,901.00. These inconsistencies call into question the petitioner's claimed employment of the beneficiary from 2001 to 2007, and the credibility of the Forms W-2. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[3] The figures in this column are based upon the deficiency between amounts paid in wages to the beneficiary and the proffered wage.

Year	Form W-2	Deficiencies	AGI	HH Expenses	Surplus
2006	$29,000.00	$15,430.00	-$38,140.00	$11,136.00	$0.00
2007	$29,000.00	$15,430.00	-$15,974.00	$11,136.00	$0.00
2008	$32,857.00	$11,573.00	$873.00	$11,136.00	$0.00
2009	$44,430.00		-$11,538.00	$11,136.00	$0.00
2010	$44,430.00		-$23,829.00	$11,136.00	$0.00
2011	$44,430.00		-$24,507.00	$11,136.00	$0.00
2012	$38,351.14[4]				

This evidence fails to demonstrate the petitioner's ability to pay the proffered wage since 2001. Although the petitioner paid the beneficiary the proffered wage in 2010 and 2011, the petitioner does not explain how he supported himself and his family and paid the beneficiary the proffered wage with a negative net income in any of the years from 2001 to 2010.

On appeal, counsel relies on language found in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), asserting that the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges USCIS to consider the wage rate paid in the relevant years as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as

[4] The petitioner submitted on appeal employment checks that it issued to the beneficiary in January, February, March, April, and May of 2012. When averaged out, the monthly wages received by the beneficiary is $3,196.00, and when multiplied by 12 months, is equaled to $38,351.14. The petitioner did not submit a tax return for 2012.

counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 1, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel infers that the balances (cash on hand) in the sole proprietor's business bank accounts are sufficient to demonstrate his ability to pay the proffered wage. The petitioner provided a copy of his business checking account statements for 2008 and 2009. The petitioner's reliance on the balances in the business bank account is misplaced. First, business checking account bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the sole proprietor in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, no evidence was submitted to demonstrate that the funds reported on the business checking account bank statements somehow reflect additional available funds that were not reflected on these tax returns. These funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses.

Counsel asserts that the petitioner owns land at , Oregon and California, with no outstanding mortgage. The petitioner submitted copies of for the above noted real estate. The petitioner also submitted as evidence copies of a quitclaim deed, a grant deed, a statutory warranty deed, and a property valuation, all evidencing the sole proprietor's ownership of real property. Contrary to counsel's claim, real estate is not a readily liquefiable asset. Further, it is unlikely that the petitioner would sell such significant assets to pay the beneficiary's wage. Moreover, any funds which may be generated from the sale of any of the property would only be available at some point in the future. A petitioner must establish its ability to pay from the date of the priority date, which in this case is May 1, 2001.

The petitioner submitted profit and loss statements for 2006, 2007, and 2008, and 2011 through May 2012. The petitioner also submitted its balance sheet schedules dated February 27, 2009. However, the petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record of proceeding contains a monthly statement from the sole proprietor's Certificate of Deposit (CD) account with the The statement indicates that the CD was opened on February 1, 1999 and that it has a maturity date of August 6, 2005, and has a current balance of $150,055.69. Although the 2005 balance amount is sufficient to demonstrate the

petitioner's ability to pay the difference between the proffered wage and the wages paid to the beneficiary in that year, there is no evidence in the record of proceeding to demonstrate the account balances during the requisite period (2001 through 2004). Therefore, absent this information, the AAO is unable to determine whether the petitioner had sufficient funds in the CD sufficient to pay the difference between the proffered wage and the wages paid to the beneficiary in those years.

The petitioner also submitted a copy of a summary statement of account dated May 18, 2012 for a Certificate of Deposit (CD) with that was issued to the sole proprietor on June 3, 2006 and which shows an available balance of $107,098.55.[5] The record does not establish how much the CD was worth in each of the years from 2006 to 2011. Although these two CDs could be considered evidence of the petitioner's ability to pay the proffered wage as of 1999 and 2012, the documentation is insufficient to demonstrate the ability of the petitioner to pay the proffered wage since 2001.

The assertions of counsel and the evidence presented on motion cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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[5] The record does not establish if either of the CDs are pension accounts. It is unlikely that a sole proprietor would withdraw funds from such pension accounts, subjecting himself to penalties and early withdrawal fees, in order to pay the beneficiary's salary.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. Overall, the record is not persuasive in establishing that the job offer was realistic.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). It appears from the evidence contained in the record of proceeding that the petitioner and the beneficiary are in a familial relationship in that they share the same last name and both list the same address as their residence. If true, this would preclude the existence of a valid employment relationship. Accordingly, if the appeal were not being dismissed for reasons set forth herein, this would call into question the bona fides of the job offer. In any further proceedings the petitioner must address this issue.

ORDER: The AAO's prior decision, dated May 11, 2012, is affirmed. The petition remains denied.